

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a Washington
corporation,

Plaintiff,

v.

MOTOROLA, INC., MOTOROLA
MOBILITY, INC., and GENERAL
INSTRUMENT CORPORATION,

Defendants.

CASE NO. C10-1823-JLR

SECOND DECLARATION OF KEVIN J.
POST IN SUPPORT OF DEFENDANTS'
OPPOSITION TO MICROSOFT'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT OF BREACH OF
CONTRACT

**NOTED ON MOTION CALENDAR:
April 20, 2012**

**HEARING SCHEDULED:
May 7, 2012**

SECOND DECLARATION OF KEVIN J. POST IN SUPPORT
OF DEFENDANTS' OPPOSITION TO MICROSOFT'S
MOTION FOR PARTIAL SUMMARY JUDGMENT OF
BREACH OF CONTRACT
CASE NO. C10-1823-JLR

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1 I, KEVIN J. POST, declare as follows:

2 1. I am an associate at the law firm of Ropes & Gray LLP, counsel to Motorola, Inc.
3 (now Motorola Solutions, Inc.), Motorola Mobility, Inc. and General Instrument Corporation
4 (collectively "Motorola"), Defendants in this action, and am a member in good standing of the
5 bars of the State of New York and the District of Columbia.

6 2. I submit this declaration in support of Defendants' Opposition to Microsoft's
7 Motion for Summary Judgment of Breach of Contract, submitted concurrently herewith.

8 3. Attached as Exhibit 27 is a true and correct copy of Motorola Mobility, Inc.'s
9 Written Responses to Certain Topics of Microsoft's Third Amended 30(b)(6) Notice of Deposition
10 and attached Exhibit E, which was served via email on April 12, 2012 (filed under seal).

11 4. Attached as Exhibit 28 is a true and correct copy of selected pages from the
12 transcript of the deposition of David A. Heiner, which was taken under oath in Seattle, WA, on
13 March 28, 2012.

14 5. Attached as Exhibit 29 is a true and correct copy of selected pages from a
15 document titled "Expert Report of Louis P. Berneman, Ed D, CLP," dated June 20, 2011, marked
16 as "CONTAIN[ING] CONFIDENTIAL BUSINESS INFORMATION SUBJECT TO
17 PROTECTIVE ORDER," and submitted in the case of *In the Matter of Certain Mobile Devices,*
18 *Associated Software, and Components Thereof*, ITC Inv. No. 337-TA-744, which is pending
19 between the parties (filed under seal). By party agreement, this document may be relied upon in
20 this case.

21 6. Attached as Exhibit 30 is a true and correct copy of selected pages from the
22 transcript of the deposition of Louis P. Berneman, ED D, CLP, which was designated Confidential
23 and taken under oath in Chicago, IL, on July 19, 2011, in the case of *In the Matter of Certain*
24 *Mobile Devices, Associated Software, and Components Thereof*, ITC Inv. No. 337-TA-744, which
25 is pending between the parties (filed under seal). By party agreement, this document may be
26 relied upon in this case.

1 7. Attached as Exhibit 31 is a true and correct copy of a document marked as
2 containing "Confidential Business Information, Subject to Protective Order" bearing production
3 numbers MS-MOTO_1823_00000908323-26 (filed under seal).

4 8. Attached as Exhibit 32 is a true and correct copy of the transcript of the deposition
5 of Horacio E. Gutierrez, which was designated as Highly Confidential – Attorneys' Eyes Only and
6 taken under oath in Seattle, WA, on April 4, 2012 (filed under seal).

7 9. Attached as Exhibit 33 is a true and correct copy of a document titled "IEEE-SA
8 Standards Board Operations Manual," approved by the IEEE-SA Standards Board December
9 2011, which was downloaded from http://standards.ieee.org/develop/policies/opman/sb_om.pdf.

10 10. Attached as Exhibit 34 is a true and correct copy of a document marked as
11 "Contain[ing] Confidential Business Information, Subject to Protective Order" and bearing
12 production number MOTM_WASH1823_0393114 (filed under seal).

13 11. Attached as Exhibit 35 is a true and correct copy of the July 15, 2010 Amended and
14 Restated Cellular Essential Properties Cross License Agreement between Motorola, Inc. and
15 Nokia Corporation, which is labeled as containing "Confidential Business Information, Attorneys'
16 Eyes Only, Subject to Protective Order," and branded with production numbers
17 MOTM_WASH1823_0024952-5013 (filed under seal).

18 12. Attached as Exhibit 36 is a true and correct copy of selected pages from the
19 uncertified rough draft transcript of the deposition of Aaron B. Bernstein, which was designed
20 Highly Confidential – Attorneys' Eyes Only and taken under oath in New York, NY, on April 11,
21 2012 (filed under seal).

22 13. Attached as Exhibit 37 is a true and correct copy of the September 13, 2004 Patent
23 Cross License Agreement between Proxim Corporation and Symbol Technologies, Inc., which is
24 labeled as "Contain[ing] Motorola Mobility, Inc. and/or Third Party Confidential Business
25 Information, Subject to Protective Order-Attorneys' Eyes Only," and branded with production
26 numbers MOTM_WASH1823_0398576-97 (filed under seal). This document was marked as

1 Plaintiff's Exhibit 36 in the April 11, 2012 deposition of Aaron B. Bernstein and was marked
 2 previously as Hearing Exhibit CX-777C and admitted into evidence in *In The Matter of Certain*
 3 *Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Inv. No. 337-
 4 TA-752 (U.S.I.T.C.) by ALJ Shaw.

5 14. Attached as Exhibit 38 is a true and correct copy of the June 9, 2004 Settlement
 6 Agreement between Hand Held Products, Inc., HHP-NC, Inc. and Symbol Technologies, Inc.,
 7 which is labeled as "Contain[ing] Motorola Mobility, Inc. and/or Third Party Confidential
 8 Business Information, Subject to Protective Order-Attorneys' Eyes Only," and branded with
 9 production numbers MOTM_WASH1823_0398559-75 (filed under seal). This document was
 10 marked as Plaintiff's Exhibit 38 in the April 11, 2012 deposition of Aaron B. Bernstein and was
 11 marked previously as Hearing Exhibit CX-776C and admitted into evidence in *In The Matter of*
 12 *Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Inv.
 13 No. 337-TA-752 (U.S.I.T.C.) by ALJ Shaw.

14 15. Attached as Exhibit 39 is a true and correct copy of the February 24, 2006 Patent
 15 License Agreement between Terabeam, Inc. and Symbol Technologies, Inc., which is labeled as
 16 "Contain[ing] Motorola Mobility, Inc. and/or Third Party Confidential Business Information,
 17 Subject to Protective Order-Attorneys' Eyes Only," and branded with production numbers
 18 MOTM_WASH1823_0398540-58 (filed under seal). This document was marked as Plaintiff's
 19 Exhibit 37 in the April 11, 2012 deposition of Aaron B. Bernstein and was marked previously as
 20 Hearing Exhibit CX-775C and admitted into evidence in *In The Matter of Certain Gaming and*
 21 *Entertainment Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752
 22 (U.S.I.T.C.) by ALJ Shaw.

23 16. Attached as Exhibit 40 is a true and correct copy of a document titled "Royalty
 24 Rates And Licensing Strategies For Essential Patents On LTE (4G) Telecommunication
 25 Standards," by Eric Stasik, which was published in Royalty Rates for Telecommunications in
 26 September 2010 and bears production numbers MOTM_WASH1823-0401980-85.

1 17. Attached as Exhibit 41 is a true and correct copy of an article titled “Industry
2 Royalty Rate Data Summary,” published in the Licensing Economics Review in December 2010.

3 18. Attached as Exhibit 42 is a true and correct copy of an article titled “Technology
4 Royalty Rates in SEC Filings,” written by Thomas R. Varner and published in the September 2010
5 issue of *les Nouvelles*.

6 19. Attached as Exhibit 43 is a true and correct copy of a document titled “Letter of
7 Assurance for Essential Patent Claims,” dated 17 January 2008 and bearing production numbers
8 MOTM_WASH1823_0092328-31.

9 20. Attached as Exhibit 44 is a true and correct copy of selected pages from the 2011-2
10 Supplement of *Drafting License Agreements* (Michael A. Epstein & Frank L. Politano, eds., 4th
11 ed., Vol. 2, 2011).

12 21. Attached as Exhibit 45 is a true and correct copy of selected pages from Drafting
13 Patent License Agreements (Brian G. Brunsvold & Dennis P. O’Reilley, eds., 5th ed., 2004).

14 22. Attached as Exhibit 46 is a true and correct copy of the product information
15 website for Microsoft’s Xbox 3604GB Console (the “Console”), including the “Overview” and
16 “What You Get” portions of the website describing the product, available at
17 <http://www.xbox.com/en-US/Xbox360/Consoles/Systems/Xbox3604GB> (last visited September
18 22, 2011). This product information website lists the Console’s retail price as \$199.99 and states
19 that the Console includes “[b]uilt in Wi-Fi” technology that is “[c]ompatible with b/g/n networks.”

20 23. Attached as Exhibit 47 is a true and correct copy of the product information
21 website for Microsoft Corporation’s Xbox 360 Wireless N Networking Adapter (the “Adapter”).
22 The page is publicly available at [http://www.xbox.com/en-US/Xbox360/Accessories/
23 CablesNetworking/Xbox360WirelessNNetworkingAdapter](http://www.xbox.com/en-US/Xbox360/Accessories/CablesNetworking/Xbox360WirelessNNetworkingAdapter) (last visited September 22, 2011).
24 This product information website lists the Adapter’s retail price as \$79.99, and states that the
25 Adapter incorporates the “[h]ighest Wireless N technology standard” and “[w]orks great with
26 existing 802.11g and 802.11b wireless routers and access points.”

24. Attached as Exhibit 48 is a true and correct copy of selected pages from the confidential designated testimony of Albert Penello, which was taken under oath in *In The Matter of Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752 (U.S.I.T.C.), marked as Hearing Exhibit CX-651C and admitted into evidence by ALJ Shaw (filed under seal).

25. Attached as Exhibit 49 is a true and correct copy of selected pages from the transcript of the January 19, 2012 hearing held in *In The Matter of Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752 (U.S.I.T.C.) by ALJ Shaw, which reproduces the sworn testimony given by Lee Rossini and bears non-consecutive production numbers MS-MOTO_1823_00005195921-49.

26. Attached as Exhibit 50 is a true and correct copy of selected pages from a document titled FY11 Accessories Plan, US Xbox 360, Last Updated July 8, 2010, which is marked as containing “Microsoft – Confidential Business Information – Subject to Protective Order” and bears production numbers MS-MOTO_1823_00005045338-68 (filed under seal).

27. Attached as Exhibit 51 is a true and correct copy of a document titled The Future of TV Begins Now on Xbox 360, which bears production numbers MOTM_WASH1823_392498-502.

28. Attached as Exhibit 52 is a true and correct copy of selected pages from the transcript of the January 18, 2012 hearing held in *In The Matter of Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Inv. No. 337-TA-752 (U.S.I.T.C.) by ALJ Shaw, which reproduces the confidential sworn testimony given by Kevin M. Murphy and bears non-consecutive production numbers MOTM_WASH1823_0401508-813 (filed under seal).

29. Attached as Exhibit 53 is a true and correct copy of the December 17, 2002 Cellular Essential Properties Cross License Agreement between Motorola, Inc. and Benefon OYJ, which

1 contains "Confidential Business Information, Attorneys' Eyes Only, Subject to Protective Order"
2 and is bears production numbers MOTM_WASH1823_0023636-73 (filed under seal).

3 30. Attached as Exhibit 54 is a true a correct copy of an article titled "Royalty Stacking
4 in High Tech Industries: Separating Myth from Reality," by Damien Geradin, Anne Layne-Farrar
5 and A. Jorge Padilla, CEMFI Working Paper No. 0701, dated January 2007.

6
7
8 I declare under penalty of perjury of the laws of the United States and the State of
9 Washington that the foregoing is true and correct.

10
11 DATED this 13th day of April, 2012.

12
13 

14 _____
Kevin J. Post

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 13th day of April, 2012.

/s/ Marcia A. Ripley

Marcia A. Ripley

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